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Attorneys for Plaintiff
TEVRA BRANDS, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

TEVRA BRANDS, LLC,

Plaintiff,

v.

BAYER HEALTHCARE LLC, and BAYER
ANIMAL HEALTH GmbH, and BAYER AG,

Defendants.

Case No. 3:19-cv-04312-BLF

**DECLARATION OF DANIEL D. OWEN
IN SUPPORT OF PLAINTIFF TEVRA
BRANDS, LLC'S OPPOSITION TO
DEFENDANT BAYER HEALTHCARE
LLC'S MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM**

Date: February 27, 2020
Time: 9:00 a.m.
Ct rm: 3, 5th Floor
Judge: Honorable Beth Labson Freeman

1 I, Daniel D. Owen, declare as follows:

2 I am an attorney admitted pro hac vice to practice before this Court. I am a principal with
3 the law firm of Polsinelli PC, attorney of record for Plaintiff Tevra Brands, LLC ("Tevra") in this
4 action. I have personal knowledge of the facts set forth herein and, if called as a witness, I could
5 and would competently testify thereto.

6 I respectfully submit this declaration in support of Plaintiff's Opposition to Defendant
7 Bayer Healthcare, LLC's ("Bayer") Motion to Dismiss for Failure to State a Claim, filed
8 concurrently herewith.

9
10 1. Tevra and its counsel have never seen, and have never possessed, any documents
11 from Bayer like those described at pp. 14-15 of Bayer's Motion to Dismiss ("Motion"). (Dkt.
12 25).

13 2. Tevra's Complaint does not reference, describe, or rely upon any document from
14 Bayer like those described at pp. 14-15 of Bayer's Motion.

15 3. In the Complaint, Tevra describes Bayer's Secret Bundled Loyalty Rebate
16 Scheme by piecing together fragmentary descriptions of the rebate program and its effects from
17 the statements of six retailers, which are set forth in the Complaint in paragraphs 92-107.
18 Although Tevra's Complaint clearly describes the anti-competitive effects of Bayer's Secret
19 Bundled Loyalty Rebate Scheme, Tevra could not describe the exact details of the rebate
20 program, its terms and conditions, or how the rebate program was carried out. Tevra's
21 Complaint states:
22
23

24 91. . . . the exact details of the rebate program are in the
25 possession and control of defendant BAH, and Tevra can only
26 describe BAH's Secret Bundled Loyalty Rebate upon information
27 and belief, based on the facts that it has learned from retailers, as
28 set forth below.

1 114. BAH forced retailers to keep the details of its Bundled
2 Loyalty Rebate scheme secret, so that no competitor could bid
against BAH on a head-to-head basis.

3 115. In their attempts to overcome the barrier created by BAH's
4 Secret Bundled Loyalty Rebate, Tevra and other generic makers
5 are in the difficult position of having to infer the terms and
conditions of the BAH rebate scheme from the limited information
they can glean from retailers.

6
7 4. Until Tevra has conducted extensive discovery, it cannot know whether Bayer's
8 rebate scheme was conducted in writing, verbally, by conduct, or by a combination of the three.

9 5. Until Tevra has conducted extensive discovery, it cannot know whether any
10 document that Bayer might attach to its Motion to Dismiss is authentic or not.

11 6. Until Tevra has conducted extensive discovery, it cannot know whether any
12 document that Bayer might attach to its Motion to Dismiss truly describes the actual rebate
13 scheme, or whether it was simply intended to create "cover" or "plausible deniability" for the
14 real rebate scheme.

15
16 7. Until Tevra has conducted extensive discovery, it cannot know whether any
17 document that Bayer might attach to its Motion to Dismiss describes *all* the operative terms and
18 conditions that might have applied to Bayer's rebate scheme in the years described in the
19 Complaint, including those established by verbal agreement, by industry custom, or by course of
20 dealing.

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22 8. Until Tevra has conducted extensive discovery, it cannot know whether the
23 written provisions of any document that Bayer might attach to its Motion to Dismiss were
24 actually carried out, or whether they were ignored in favor of a different rebate scheme carried
25 out verbally, or by tacit conduct of the parties.

26 9. Until Tevra has conducted extensive discovery, Tevra cannot know the economic
27 impact of the rebate scheme on retailers, on customers, and on Bayer's competitors. To
28

1 understand this economic impact, Tevra will seek discovery of numerous facts known only to
2 Bayer, including details about all payments made by Bayer pursuant to its rebate scheme,
3 communications about the implementation of the rebate scheme, sales and margin figures for
4 products impacted by the rebate scheme, and the competitive strategy and business rationale
5 behind Bayer's rebate scheme. Tevra will also seek documents and testimony from third parties
6 (including impacted retailers) reflecting the economic impact of Bayer's rebate scheme. Finally,
7 expert testimony from an economist or industry expert may be necessary to aid the Court in
8 understanding the economic impact of Bayer's rebate scheme in the context of other conduct by
9 Bayer that may have served to protect and preserve Bayer's monopoly in the market for topical
10 Imidacloprid.
11

12 10. The extensive discovery described above will be needed before Tevra can prevent
13 facts essential to justify its opposition to Bayer's Motion to Dismiss.
14

15 11. I declare under penalty of perjury under the laws of the State of California that the
16 foregoing is true and correct and this declaration was made this 25th day of October, 2019 in
17 Kansas City, Missouri.
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19 By: /s/

20 Daniel Owen
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